MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-60

GERALD TILLEM,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Gerald Tillem, your Petitioner, prays that a Writ of Certiorari issue to review the order of the Supreme Court of New Jersey entered in the above-entitled cause on June 18, 1974.

Opinion Below

The order of the Supreme Court of New Jersey denying a Petition for Certification to the Appellate Division, Superior Court of New Jersey was entered herein without opinion on June 18, 1974. It has not yet been offi-

cially reported and is reprinted at p. 1a of the Appendix hereto.

The opinion of the Appellate Division, Superior Court of New Jersey per the Honorable Joseph Halpern, P.J. A.D., entered herein on March 29, 1974, is reported at 1 to 7 N. J. Super. 421, 317 A. 2d 738 (App. Div. 1974). It is reprinted at p. 2a to 12a of the Appendix hereto.

Jurisdiction

1. The judgment of the Supreme Court of New Jersey was entered on June 18, 1974 and is final by its terms.

2. No application for rehearing or for an extension of time within which to petition for certiorari has been applied for, granted or denied.

3. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

Questions Presented

1. Is N.J.S. 2A:119A-3, which makes any person who engages in the business of making loans or forbearances at a rate exceeding 50% per annum a criminal, repugnant to the due process clause of the Fourteenth Amendment by reason of its vagueness and uncertainty?

Constitutional Provisions Involved

The Fourteenth Amendment to the Constitution of the United States: ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Statement of Case

This is an appeal in a criminal case from a judgment of conviction on a single count of "being in the business of making loans or forbearances in excess of 50% per annum" contrary to the provisions of N.J.S. 2A:119A-3. N.J.S. 2A:119A-3 reads as follows:

> Any person who engages in the business of making loans or forbearances prohibited by section 1 of this act, or who conspires so to do, shall be guilty of a high misdemeanor and shall be punished by a fine of not more than $10,000.00, or by imprisonment for not more than 25 years, or both. N.J.S. 2A:119A-3.

Originally the defendant was charged in an eight count New Jersey State Grand Jury indictment. The first count charged him with willfully, knowingly and unlawfully engaging in the business of making loans and forbearances at a rate of interest exceeding 50% per annum between February of 1970 and July 12, 1972, in violation of N.J.S. 2A:119A-3, as set forth *in toto* aforesaid. Counts Two through Eight charged the defendant with seven substantive loans in excess of 50% per annum in violation of N.J.S. 2A:119-1. N.J.S. 2A:119-1 reads as follows:

> Any person who, not being authorized or permitted by law so to do, charges, takes or receives any money, property or other thing of value as interest on the loan or forbearances of any money or other property at a rate exceeding 50% per annum, or the equivalent rate for a longer or shorter period, is guilty of a misdemeanor and shall be punished by a fine of not more than $5,000.00, or by imprisonment for not more than 5 years, or both. N.J.S. 2A:119-1.

Prior to the commencement of the trial the defendant, through his counsel, moved to dismiss the First Count which charged him with being in the business of making loans at a rate of interest exceeding 50% per annum on the ground that the Statute was unconstitutional because of its vagueness (T 3, 17 through 23).* This motion was denied by the trial judge (T 3, 24 to T 4, 18). The case then proceeded to trial and the defendant was convicted on all counts. The defendant was sentenced on the "doing business" count to a term in the New Jersey State Prison of not less than ten nor more than fifteen years, and on each of the seven substantive counts to a term in the New Jersey State Prison of not less than two nor more than three years. The sentence on the substantive counts were to be consecutive to each other and consecutive to the sentence on the "doing business" count. Defendant appealed.

At the Appellate level the defendant again raised the constitutionality of the "doing business" statute because of its vagueness, but his challenge was rebuffed. However, the intermediate Appellate Court accepted the defendant's argument that the seven substantive counts "merged" in the "doing business" count and reversed the convictions for the seven substantive loans. Nevertheless, the defendant was still exposed to a minimum of ten years and a maximum of fifteen years on the "doing business" count.

Defendant's challenge to the constitutionality of N.J.S. 2A:119A-3 was raised and argued at Point I in defendant's brief in the Appellate Division, Superior Court of New Jersey, and was disposed of adversely as to defend-

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* The reference "T" refers to the Transcript of the trial herein.

ant by that Court (5a). The issue was further raised as Point I in the Petition for Certification filed by defendant in the Supreme Court of New Jersey, which was denied on June 18, 1974 (1a). Therefore, defendant's position has been preserved throughout the appellate process leading to this petition.

Reasons for Granting the Writ

1. Certiorari should be granted to permit this Court to decide the issue of the constitutionality *vel non* of New Jersey's loan-sharking statute because of the extremely severe penalty provisions attached to its trespass and the genuine likelihood that it will be utilized more frequently in future state court prosecutions.

N.J.S. 2A:119A-3 says:

> Any person who engages in the business of making loans or forbearances prohibited by section 1 of this act (N.J.S. 2A:119A-1) shall be guilty of a high misedemanor and shall be punished by a fine of not more than $10,000.00, or by imprisonment for not more than 25 years, or both.

In its applicable part, section 1 (N.J.S. 2A:119A-1) reads as follows:

> Any person who . . . receives any money as interest on a loan or forbearance of any money . . . at a rate exceeding 50% per annum, . . . is guilty of a misdemeanor . . .

It is and has been the defendant's position that the "being in the business of making usurious loans" statute is so vague as to be constitutionally infirm under the Due Process Clause of the Fourteenth Amendment. It is es-

tablished that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966). Put another way, no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926). This concept has been recognized by the highest court of New Jersey. *State* v. *Smith,* 46 N. J. 510 (1966).

Exactly what does "engaging in the business of making usurious loans" mean? The Act contains no definition of "engaging in the business" nor does it set forth any standard by which it could be determined that one was engaging in the business of making loans. Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. In the statute subject to attack at bar, there is no attempt made by the legislature to define or set standards on "engaging in the business of making loans". These words are subject to numerous and varied interpretations. In *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939), another New Jersey statute—the Anti Gangster Law—was challenged constitutionally on the grounds of vagueness and was struck down by the United States Supreme Court. Concededly, no two statutes are alike as to wording or purpose, but a close comparison of the New

Jersey "loansharking" act with the Anti-Gangster Law shows that the former does not even contain either a definition or standards which the latter did and the latter (even with some attempt at definition) was struck down. The vice of N.J.S. 2A:119A-3 is that it leaves open the widest possible inquiry as to meaning of terms, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.

By exercising jurisdiction herein, this Court cannot only correct the injustice visited upon the defendant, but can also alert law-enforcement personnel that whereas clearly defined penal statutes will be upheld those statutes which attempt to punish without precision will fall.

CONCLUSION

For the foregoing reasons and based on the foregoing authorities, Petitioner respectfully requests this Court to grant the Petition for Certification to the Appellate Division, Superior Court of New Jersey.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Order of Supreme Court of New Jersey Denying Petition for Certification

SUPREME COURT OF NEW JERSEY

C-666 SEPTEMBER TERM 1973

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

GERALD TILLEM,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 18th day of June, 1974.

FLORENCE R. PESKOE
Clerk

Filed

Jun 18 1974

FLORENCE R. PESKOE
Clerk

APPENDIX B

Opinion of the Appellate Division of the Superior Court of New Jersey

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2895-72

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

GERALD TILLEM,

Defendant-Appellant.

Argued February 20, 1974—Decided Mar 29 '74

Before Judges HALPERN, MATTHEWS and BISCHOFF.

On appeal from Monmouth County Court.

Mr. Robert A. Coogan argued the cause for appellant (*Messrs. Saling, Moore, O'Mara & Coogan,* attorneys).

Mr. Michael A. Graham, Deputy Attorney General, argued the cause for respondent (*Mr. William F. Hyland, Jr.,* Attorney General of New Jersey, attorney; *Mr. George F. Kugler, Jr.,* former Attorney General of New Jersey, and *Michael A. Graham,* of counsel and on the brief).

Appendix B

The opinion of the court was delivered by

HALPERN, P.J.A.D.

Following a jury trial, defendant was convicted of engaging in the business of "loan sharking" in violation of N.J.S.A. 2A: 119A-3. He was also convicted, at the same trial, on seven counts of "loan sharking" representing seven illegal loans made to four different individuals over a two and one-half year period, wherein the annual rate of interest charged was between 200 and 300%, in violation of N.J.S.A. 2A:119A-1. He was sentenced on the latter seven charges to consecutive 2-3 year State Prison terms, and on the former charge to a State Prison term of 10-15 years, to be served consecutively to the sentences imposed on the seven charges. In all, he was given State Prison sentences totalling 24-36 years.

Before considering the issues raised on this appeal, we pause to point out that defendant neither testified nor called any witnesses in his defense; and we find the uncontradicted proofs of the State amply supported the convictions.

I

CONSTITUTIONALITY OF N.J.S.A. 2A:119A-3

Defendant argues that N.J.S.A. 2A:119A-3 is unconstitutional because of vagueness, in that "* * * it does not spell out the degree or details of 'engaging in the business' of making loans." The statute provides:

> 2A:119A-3. BUSINESS OF MAKING PROHIBITED LOANS OR FOREBEARANCES; PENALTY
>
> Any person who engages in the business of making loans or forebearances prohibited by section 1

> of this act, or who conspires so to do, shall be guilty of a high misdemeanor and shall be punished by a fine of not more than $10,000.00, or by imprisonment for not more than 25 years, or both.

The contention is without merit. Reading, as we must, N.J.S.A. 2A:119A-1 through 2A:119A-4 as a whole statutory scheme to prevent and punish the crime of loan sharking, we are satisfied that men of common intelligence do not have to guess at the legislative meaning or differ as to the application of the term "engages in the business of making [illegal] loans." *State* v. *Joas,* 34 N. J. 179, 185 (1961). The four sections of the loan sharking statutes must be considered as a homogeneous and consistent whole giving effect to all their provisions. *State* v. *Green,* 62 N. J. 547, 554-555 (1973). Giving the statutory words their common, ordinary, common-sense construction, they can be defined as meaning one who carries on an enterprise, a business or a profession for profit or improvement over a period of time, as distinguished from one who commits or occasionally participates in a single act or transaction. See *Webster's Third New International Dictionary,* 1969, p. 751; *Black's Law Dictionary,* (4 ed. 1951), p. 622; 58 C.J.S., *Money Lenders,* §1, pp. 852-853 (1948); *Fleckenstein Brothers' Company* v. *Fleckenstein,* 66 N. J. Eq. 252, 256-257 (Ch. 1904).

The trial judge in clear and plain language defined the term to the jury thusly:

> Now, what does the statute mean by someone who engages in the business of making loans? What do we mean by business? Well, business as used in the statute pertains in a very broad sense to all gainful activity. A business could be called

occupation or work of some sort in which a person is engaged on a regular basis.

If a person engages in a certain type of transaction once and that's all, you certainly wouldn't consider that person to be in the business. If, however, that type of conduct is repeated to the extent that there is a certain regularity to that type of conduct, then it could be inferred properly that that person was in that business. It's in that sense that we use the term business that I have just read to you.

We need hardly labor the point any further since we are satisfied the statute informs those concerned what is proscribed and, therefore, is not void for vagueness.

II

Scienter and Criminal Intent

Defendant contends the trial judge erred in refusing to charge the jury that scienter and criminal intent were essential elements of N.J.S.A. 2A:119A-1 and 3 which the State had to prove in order to convict him. We disagree.

Whether a statute provides criminal sanctions for proscribed conduct, without proving criminal intent, is a matter of statutory construction. There are areas where the evil or danger sought to be prevented is so great that the Legislature may, as a matter of public policy, declare an act unlawful without proof of a wrongful intent. *State* v. *Hatch*, 64 N. J. 179 (1973); *Morss* v. *Forbes*, 24 N. J. 341, 358 (1957). We believe the Legislature felt loan sharking is of that invidious caliber. We would have to be very naive to believe that one who loans

money to individuals at annual interest rates in excess of the lawful rates (here it was 200-300%) does not know he is violating the law.

III

Prosecutor's Summation

Defendant argues the prosecutor's comments in summation deprived him of a fair trial. The comments complained of consisted of a reference to defendant, by way of sarcasm, as a "giant angel"; likened defendant to Shakespear's Shylock in exacting a "pound of flesh"; and in referring to a specific loan made by defendant, said the borrower had "his guts torn out." These were strong comments, but in the light of the evidence, defense counsel's summation, and the nature of the charges and proofs, they were justifiably made and can hardly be deemed sufficiently prejudicial to warrant a reversal. *United States* v. *La Sorsa,* 480 F. 2d 522, 526 (2 Cir. 1973), *cert.* den. 38 L. Ed. 2d 105 (1973); *State* v. *Knight,* 63 N. J. 187, 193-194 (1973); *State* v. *Wilson,* 57 N. J. 39, 50 (1970). In any event, the trial judge instructed the jury that its verdict must be based on the evidence. See *United States* v. *Ramos,* 268 F. 2d 878, 880 (2 Cir. 1959). If error existed, it was harmless beyond a reasonable doubt in view of the overwhelming evidence of defendant's guilt. *Milton* v. *Wainwright,* 407 U. S. 371 (1972); *Harrington* v. *California,* 395 U. S. 250 (1969); *Chapman* v. *California,* 386 U. S. 18 (1967), reh. den. 386 U. S. 987 (1967).

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IV

MERGER

Defendant contends the seven individual charges for loan sharking merged in the greater offense of engaging in the business of loan sharking. We agree.

The legislative intent must be garnered from the loan sharking statute considered in their context as a whole. This is particularly true since they were passed at the same time to effectuate a given result or to overcome a certain evil. N.J.S.A. 2A:119A-1 proscribes the making of loans in the amount of $1,000, or more, at a rate in excess of the annual or equivalent legal rate of interest but not in excess of 50% per year, and designates such offenses as misdemeanors. It then provides that any person who makes a loan at an annual or equivalent legal rate of interest in excess of 50% per year, regardless of the amount or duration of the loan, is guilty of a high misdemeanor.*

N.J.S.A. 2A:119A-2 makes it a high misdemeanor, punishable by imprisonment for not more than 25 years, or a fine not greater than $10,000, or both, for any person to use or threaten to use force in connection with a loan made in violation of N.J.S.A. 2A:119A-1. Here the Legislature obviously intended to severely punish loan sharkers, or their agents, who commit or threaten to commit violence upon borrowers of the proscribed illegal loans.

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* It was under this latter provision that the seven counts were premised since the annual or equivalent rate of interest allegedly charged exceeded 50%.

Appendix B

N.J.S.A. 2A:119A-3, as previously set forth herein, seeks to reach those who engage in the business of loan sharking, as distinguished from those involved in an isolated transaction. And, here again, the Legislature considered the business of loan sharking a menace and detriment to the public welfare, and prescribed the severe penalties for violators of imprisonment for not more than 25 years, or a fine not greater than $10,000, or both.

N.J.S.A. 2A:119A-4, not applicable here, made it misdemanor punishable by a maximum of three years imprisonment, or a fine not greater than $25,000, or both, for any person who knowingly possesses, maintains or has control over anything used to record the proscribed loan sharking transactions.

Viewing these statutes as indicated, we are satisfied that one is not guilty of engaging in the business of loan sharking unless it is shown that various loans are made as part of a continuing criminal impulse, namely, to engage in the business of loan sharking. Here, the proofs were not controverted that defendant made at least seven loans proscribed by N.J.S.A. 2A:119A-1 to four different individuals over a period of two and one-half years. This was the kind of illegal business the Legislature sought to prevent. For an incisive discussion of the evils of loan sharking, see "Syndicate Loan-Shark Activities and New York's Usury Statute", 66 *Colum. L. Rev.* 167 (1966).

The seven separate illegal loans were constituent elements of the greater offense of engaging in the business of loan sharking and, therefore, merged in the conviction of the greater offense. They cannot be fractionalized according to its component parts. *State* v. *Riley*, 28 N. J. 188, 195 (1958), appeal dismissed, 359 U.S. 313 (1959); *State* v. *Mowser*, 92 N. J. L. 474 (E. & A. 1919); Note, *Twice In Jeopardy*, 75 Yale L. J. 262, 318-319 (1965). See also Final Report New Jersey Penal Code, §2C:1-6 and Commentary.

Appendix B

In enacting N.J.S.A. 2A:119A-3 the Legislature intended to punish a course of conduct (engaging in the business of loan sharking), therefore, all violations that spring from that singleness of thought and deed, are but one offense. *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952). See also *State* v. *Di Rienzo*, 53 N. J. 360 (1969); *State* v. *Mills*, 51 N. J. 277, 289 (1968), *cert.* den. 393 U.S. 832 (1968). This principle was enunicated by Otto Kirchheimer in "The Act, The Offense and Double Jeopardy", 58 *Yale L. J.* 513, 522 (1949):

> The unifying element in the cases where 'consumption' or 'subsidiarity' may be called into play *exists in the perpetrator's own mind and in his ultimate goal. Whatever appears to him as the principal object of his criminal endeavors becomes the main object of the law's protection.* All other stages or aspects of his action, be they antecedent, simultaneous, or posterior, would assume independent significance only if their perpetration would endanger a different social interest; *otherwise, they merge in the offense category protecting the interest towards which the main attention of the perpetrator is directed* (emphasis added).

If the Legislature had intended to make individual loan sharking acts separate offenses it would have so provided. Having failed to do so, it is reasonably inferable that the individual offenses merged in the greater offense because without proof of the individual offenses the crime of engaging in the business of loan sharking could not be proven. The "rule of lenity" which has been often applied in construing legislation should be utilized to prevent multiple convictions where none was intended. See *Heflin* v.

United States, 358 U.S. 415 (1959); *Ladner* v. *United States,* 358 U.S. 169 (1958); *Bell* v. *United States,* 349 U.S. 81 (1955); 8 *Moore, Federal Practice,* §8.07(2), 1973, pp. 8-60 to 8-61. The philosophy behind the rule was expressed by Justice Frankfurter thusly:

> It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more

to go on than the present case furnishes. (*Bell* v. *United States*, 349 U.S. *supra*, at 83-84).

In view of the nature of the crime here involved, we find no abuse of the trial judge's sentencing discretion on the first count.

Having decided that the seven lesser included offenses (counts 2-8 in the indictment) merged in the greater offense (count 1 of the indictment), we reverse the convictions on the seven individual counts for loan sharking, and vacate the sentences imposed thereon. We affirm the conviction for unlawfully engaging in the business of loan sharking.